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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.;
OTTOMOTTO LLC; OTTO TRUCKING
LLC,

Defendants.

Case No. 3:17-cv-00939-WHA

**OTTO TRUCKING'S OPPOSITION TO
WAYMO'S PRÉCIS RE: ADVERSE
INFERENCE INSTRUCTION [DKT. 2052]**

Date : October 26, 2017
Courtroom: 8-19th Floor
Judge: Hon. William H. Alsup
Trial: October 10, 2017

The Court should deny Plaintiff Waymo, LLC's ("Waymo") Précis in Support of Request to File Motion for an Adverse Inference Jury Instruction (the "Précis"). Dkt. No. 2052. This is for at least four reasons: *First*, Waymo's Précis is not permitted by the Court's Orders, and is untimely. *Second*, the Précis does not refer to any conduct relating to *Otto Trucking* in this litigation. *Third*, Otto Trucking could not have spoliated evidence relating to Anthony Levandowski's laptops because Otto Trucking never had Mr. Levandowski's laptop. And *fourth*, Waymo has suffered no prejudice warranting the adverse inference here.

I. This Précis Was Not Permitted By The Court's Orders And Is Untimely.

The Court's October 4 Order is not an open invitation for Waymo to bring endless motions seeking to revisit already rejected motions. Dkt. No. 1954. But Waymo's Précis—one of seven motions it filed on October 23—seeks to do exactly that. The Précis once again seeks an adverse inference instruction for spoliation based on the Stroz report. No such inference is warranted, and Waymo's recidivist motion should be denied.

Waymo's Précis was not permitted by the Court's Orders and, on that basis alone, should be denied. The Court's October 4 Order permitted Waymo to file motions relating to "[a]ny request by Waymo to amend its list of asserted trade secrets for trial, expert reports, or lineup of trial exhibits and witnesses must be made via a formal motion." *Id.* Moreover, by the Court's October 16 Order, the parties were allowed to supplement any "currently-pending motion based on newly-discovered evidence," by October 23. Dkt. No. 2009. The Court's order did not authorize the wholesale filing of *entirely new* motions based on discovery in this late stage of the litigation. Dkt. No. 1954 at 2 ("[E]xcept for discovery disputes, no new motion (or supplement to any pending motion) may be filed in this action without the Court's advance permission.").

Notwithstanding the Court's October 4 and 16 Orders, Waymo seeks in this submission to explore evidentiary issues it never raised before, despite the fact that it sat on this information for months.

The issues Waymo identifies in its Précis are all things it has known for quite some time and could have raised in earlier motion practice. Otto Trucking addresses just a few of Waymo's untimely assertions below.

Waymo complains about deleted text messages and the destruction of the Drobo 5D discs, but it has known about these facts since long before the Stroz discovery occurred. Waymo was aware of an auto-delete function on Mr. Kalanick's cell phone as early as July 27, 2017, during Mr. Kalanick's deposition. *See* Précis at 3 (citing to 07/27/17 transcript of Mr. Kalanick's deposition). And, Waymo knew about Nina Qi's cell phone activity as early as June 22, 2017. *Id.* (citing to 06/22/17 transcript of Ms. Qi's deposition). The same pertains to the Drobo 5D discs, which Waymo now claims was new information learned through the Stroz report. *See id.* at 3–4. Not so. Waymo has known about these five discs for months, since at least as early as July 27 during Mr. Kalanick's deposition, and it examined Mr. Kalanick about this very issue. *See* 07/27/17 Kalanick Dep. Tr. at 22:8–25:8.

Waymo also claims that Defendants in bad faith failed to preserve evidence related to Anthony Levandowski's laptops. Précis at 4. Goodwin Procter has repeatedly explained to Waymo that Otto Trucking never possessed these laptops. Dkt. No. 2019-1 ¶ 5. But Waymo knew about Mr. Levandowski's laptops since at least September 7. That is the date when Uber's expert witness Kevin Faulkner served his expert report on Waymo, and disclosed to Waymo the existence of the computers, as well as Goodwin Procter's search of them, now more than a month and a half ago. *See id.* ¶ 7. In response to this information, Waymo again did nothing.

Rather than act on this months-old information, Waymo has unreasonably delayed until October 23 to file this Précis. This Précis is an attempt to get around the limits the Court put in place surrounding motions such as this one. The Court did not permit Waymo to seek open-ended motion practice. It is clear that Waymo intends to try to use the Court's October 4 and October 16 Orders as a discovery "do-over"—to seek an adverse inference again as a catch-all for what it failed to do before.

II. There Is No Evidence Of Any Spoliation By Otto Trucking.

Waymo's Précis also fails to set forth any facts attributable to Otto Trucking. Waymo's Précis wrongly suggests—again—that *Otto Trucking* spoliated evidence because *Anthony Levandowski* has asserted his Fifth Amendment rights and, prior to litigation, allegedly destroyed a hard drive. *See* Précis at 3 ("Levandowski claims (without any verification) that he intentionally

1 destroyed evidence in March of 2016—when he was running Defendants Ottomotto and Otto
 2 Trucking—and did so at defendant Uber’s direction.”). Waymo’s Précis fails to offer *any*
 3 indication or evidence that suggests Mr. Levandowski acted on behalf of Otto Trucking when he
 4 took these actions. *See generally id.* at 2–4.

5 During the Court’s September 20 hearing, it gave Waymo one more opportunity to sift
 6 through the recently produced Stroz information and show that Mr. Levandowski was “wearing
 7 his Otto Trucking hat.” 09/20/17 Hearing Tr. at 67. Over a month of discovery later, Waymo has
 8 proffered no evidence that any of the accusations against Mr. Levandowski were done while he
 9 was “wearing his Otto Trucking hat.” In fact, the only evidence adduced is from Lior Ron who
 10 squarely rejected such an assertion. Mr. Levandowski did not have any Otto Trucking hat,
 11 because Otto Trucking had no business operations—a fact that is undisputed at this late point in
 12 the litigation.

13 **III. There Was No Spoliation Of Anthony Levandowski’s Laptops.**

14 Waymo incorrectly suggests that Goodwin Procter acted in bad faith by searching Mr.
 15 Levandowski’s laptops “for Defendants’ own benefit, but fail[ed] to preserve and produce them to
 16 Waymo.” Précis at 4. Goodwin Procter was acting as Mr. Levandowski’s personal counsel when
 17 it took temporary custody of, and searched, Mr. Levandowski’s laptops. Dkt. No. 2019-1 ¶¶ 5–6.
 18 It was not as Otto Trucking’s counsel. *Id.* Otto Trucking could not have spoliated evidence
 19 relating to the laptops because Otto Trucking never had, and does not have Mr. Levandowski’s
 20 laptops. *Id.* ¶ 5. Otto Trucking has repeatedly stated this fact to Waymo’s counsel. *Id.*

21 Despite having clear knowledge of Goodwin Procter’s representation of Mr. Levandowski
 22 in pending arbitration proceedings initiated by Google, Waymo stubbornly refuses to recognize
 23 that Mr. Levandowski and Otto Trucking are separate. Otto Trucking does not have access to Mr.
 24 Levandowski’s materials and, as a result, Waymo subpoenaed him. As the Court is well aware, to
 25 the extent Waymo moved to compel against Mr. Levandowski, he properly asserted his Fifth
 26 Amendment rights against production. Waymo cannot circumvent Mr. Levandowski’s assertion
 27 by simply alleging Otto Trucking was a custodian of devices it never had.

28 Waymo appears to complain that Mr. Levandowski chose to provide Uber documents back

1 to Uber after they fired him. Précis at 4–5. But this too has been explained to Waymo multiple
 2 times. At Uber’s request, Goodwin ran searches of Mr. Levandowski’s devices and provided the
 3 results to Uber on behalf of Mr. Levandowski. *See* Dkt. Nos. 2018-3 ¶¶ 2–3; 2019-1 ¶ 6. Mr.
 4 Levandowski maintains his Fifth Amendment rights as to the devices. None of this has anything
 5 to do with Otto Trucking.

6 Waymo’s Précis is just an attempt to rehash the same argument that the Court soundly
 7 rejected. As it noted in its July 12, 2017 Order, “Waymo’s complaint that Mr. Levandowski
 8 knows where the material he downloaded from Waymo is located, and therefore Otto Trucking
 9 must know, is disingenuous. As Waymo is well aware, Mr. Levandowski has refused to cooperate
 10 with any discovery in this matter on Fifth Amendment grounds.” Dkt. No. 881 at 3.

11 **IV. Waymo Cannot Point To Any Prejudice It Suffered In Connection With The Alleged**
 12 **Acts Of Spoliation.**

13 Waymo fails to establish any prejudice from the alleged spoliation. “In considering what
 14 spoliation sanction to impose, if any, courts generally consider the degree of prejudice suffered by
 15 the opposing party.” *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 563 (N.D.
 16 Cal. 2008) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)); *see In*
 17 *re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1066–67 (N.D. Cal. 2006). Consistent
 18 with this principle, some courts have denied requests for an adverse inference instruction even
 19 where the three-part test for spoliation was satisfied, upon concluding that the degree of fault and
 20 level of prejudice were insufficient to justify imposition of the sanction. *See, e.g., Chin v. Port*
 21 *Auth. of New York & New Jersey*, 685 F.3d 135, 161–62 (2d Cir.2012) (holding that district court
 22 did not abuse its discretion in denying an adverse inference instruction notwithstanding a finding
 23 of spoliation); *Hamilton v. Signature Flight Support Corp.*, No. C 05–0490 CW(MEJ), 2005 WL
 24 3481423, at *6–9 (N.D. Cal. Dec. 20, 2005).

25 Here, Waymo has not shown how an adverse inference jury instruction is the appropriate
 26 remedy because it fails to show how it was prejudiced by any alleged spoliation by Otto Trucking.
 27 Indeed, Waymo does not even state with any precision what specific fact it seeks to apply an
 28 adverse inference to. The Précis instead states in generalized claims that Defendants acted in bad

1 faith which warrant an adverse inference instruction, without any reference to how the act is
 2 attributable to Otto Trucking, and what disputed issue of fact the adverse inference should be
 3 applied to.

4 The fact is Waymo cannot show prejudice because it has not suffered any. At the time the
 5 five Drobo 5D discs and certain text messages were deleted, all of these actions involving
 6 Anthony Levandowski or Lior Ron predated the Uber-Ottomotto acquisition. *See, e.g.*, Dkt. No.
 7 1928-24. In fact, these actions occurred during, and some in connection with, the due diligence
 8 investigation to ensure that none of Waymo's confidential information found its way to Uber's
 9 self-driving technology. *Id.* To the extent any Waymo confidential information was destroyed in
 10 the course of Uber negotiating an acquisition with Ottomotto and Otto Trucking, Waymo was not
 11 prejudiced for the simple reason that the information did not reach Uber.

12 The same conclusion pertains to Waymo's argument about Mr. Levandowski's laptops.
 13 Waymo claims that "Defendants did not preserve those laptops so they can be produced to
 14 Waymo." Précis at 4. But the laptops would not have been produced to Waymo because Mr.
 15 Levandowski has asserted his Fifth Amendment rights. *See* Dkt. No. 881 at 3. To the extent that
 16 there were any relevant materials on the laptops, they would have been part of Mr. Levandowski's
 17 *in camera* Fifth Amendment privilege review in response to Waymo's subpoenas to Mr.
 18 Levandowski, and not accessible to Waymo. *See* Dkt. 802 (order denying Waymo's motion to
 19 compel following *in camera* review of log of materials subject to Fifth Amendment rights). But
 20 this is not an issue for Otto Trucking in this Précis seeking adverse inference instructions. It is an
 21 issue to be resolved in Waymo's pending Motion to Compel. *See* Dkt. Nos. 1994, 2019.

22 And even so, whatever may have been on Mr. Levandowski's laptops, Waymo has been
 23 unable to show any of it was communicated or used by Otto Trucking. The absence of such
 24 corroborating evidence is unsurprising because Otto Trucking develops no technologies, uses
 25 neither Fuji nor Spider, and has no employees. 10/02/17 Ron Dep. Tr. at 80:8–87:2. It exists
 26 solely as a company to hold physical trucks. *Id.* at 84:18–85:9. Without any corroborating
 27 evidence of what confidential Waymo information Otto Trucking may have used, Waymo has no
 28 basis to argue prejudice.

V. Conclusion

For the foregoing reasons, Defendant Otto Trucking LLC respectfully requests an Order from the Court DENYING Waymo's Précis in Support of Request to File Motion for an Adverse Inference Jury Instruction on Account of Defendants' Spoliation.

Dated: October 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document including all of its attachments with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **October 25, 2017**. I further certify that all participants in the case are registered CM/ECF users and that service of the publicly filed documents will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **October 25, 2017**.

/s/ Brett Schuman
Brett Schuman